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**IN THE
COURT OF APPEALS OF INDIANA**

DONSHA L. MOORE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A05-0711-CR-646

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0608-FA-246

May 15, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Donsha L. Moore (“Moore”) was convicted in Madison Superior Court of Class A felony rape, Class A felony burglary resulting in bodily injury, and Class B felony criminal confinement. Moore appeals and argues that the trial court abused its discretion in replacing a juror and that the trial court erred in admitting hearsay evidence.

We affirm.

Facts and Procedural History

On July 21, 2006, K.B. lived by herself in an apartment in Anderson, Indiana. At approximately 9:30 p.m. that night, K.B. engaged in sexual intercourse with her boyfriend and then went out with friends. She later returned to her apartment and went to bed at around 4:00 a.m. K.B. awoke at 4:30 a.m. to the sound of someone knocking on her door. She answered the door and saw a black male that she did not recognize, but who she later identified as Moore. Moore asked for someone by name and K.B. replied that she did not know the person Moore asked for. Moore left and K.B. went back to sleep. Shortly thereafter, K.B. answered another knock on the door. Moore was at the door and forced his way inside the apartment. Moore had a handgun that he then held to K.B.’s head asking for “her dude.”

Moore asked for her cell phone to call “his dudes” and K.B. gave him her phone. After Moore instructed the person on the phone to meet him in ten minutes, he hung up the phone. Moore then proceeded to have sexual intercourse with K.B. without her consent.

Afterwards, Moore asked for and received a few cigarettes from K.B. that he smoked. As he left, he took K.B.’s cell phone, and told her that he would drop it outside

and that she was to wait ten minutes to allow him time to run away. Moore then asked for K.B.'s phone number. After Moore left, K.B. waited a short time before calling the police. Paramedics took K.B. to the hospital where she was examined by a sexual assault nurse examiner, Holly Rentz ("Nurse Rentz"), at about 7:30 a.m. Nurse Rentz observed some fresh lacerations to K.B.'s genitalia.

On August 1, 2006, the State charged Moore with Class A felony rape, Class A felony burglary resulting in bodily injury, and Class B felony criminal confinement. The first jury trial ended in a hung jury, but Moore was convicted as charged after a second jury trial.

During the second jury trial, Nurse Rentz testified concerning her examination of K.B. She also testified about a small study regarding the injuries to females during consensual sexual intercourse. Moore objected to this testimony, but the trial court overruled this objection.

Also, after the presentation of evidence and reading of the instructions but before deliberations began, a juror sent a note to the trial court indicating that he knew K.B.'s boyfriend through relatives. Upon receipt of the note, the trial court held a hearing in which the juror testified that he had knowledge that the injuries to K.B. could have been caused by her boyfriend because he had a reputation for "physical prowess." Over Moore's objection, the trial court excused the juror because it did not want a juror who would provide an alternative theory of the case that had not been supported by the evidence presented. The trial court then seated the alternate juror. The jury convicted

Moore as charged. Thereafter, Moore was sentenced to an aggregate forty-eight-year sentence. Moore appeals.

I. Juror Replacement

Moore argues that the trial court abused its discretion when it excused a juror and seated the alternate juror. Article I, Section 8 of the Indiana Constitution guarantees an impartial jury. To effectuate that guarantee, a biased juror must be dismissed. The trial court has broad discretion to replace a juror with an alternate, and we will only reverse such a decision if the determination is arbitrary, capricious, or an abuse of discretion. May v. State, 716 N.E.2d 419, 421 (Ind. 1999). The trial court is generally in the best position to determine the honesty and integrity of a juror and the juror's ability to perform as a conscientious, impartial juror. Id.

Moore contends that the juror should not have been removed from the jury since an admonishment to the juror would have been sufficient to prevent that juror from discussing his impressions of K.B.'s boyfriend. As noted by the trial court, however, the juror had knowledge, whether correct or not, that led him to an alternative theory of the case not supported by the evidence before the jury, i.e. that the injuries to K.B. resulted from her encounter with her boyfriend, not her encounter with Moore. This alternative theory did not support or relate to Moore's defense that the encounter was consensual. The trial court's concerns centered on whether the juror could ignore this unsubstantiated and irrelevant evidence and focus on the evidence adduced at trial. For these reasons, we cannot say that the trial court abused its discretion by replacing the juror with an alternate.

II. Nurse Rentz's Testimony

Moore claims that the trial court abused its discretion by admitting Nurse Rentz's testimony regarding a study of injuries related to consensual sex. The admission and exclusion of evidence lies within the sound discretion of the trial court; therefore we review admission of testimony for abuse of that discretion. State v. Lloyd, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003). Such an abuse occurs when the "decision is clearly against the logic and effect of the facts and circumstances." Id.

Moore argues that Nurse Rentz's testimony on a study related to consensual sex injuries should not have been allowed since Nurse Rentz was not qualified as an expert and the testimony was based on hearsay evidence. However, the trial court determined that Nurse Rentz qualified as an expert when it stated, in response to Moore's objection regarding her status as an expert, that "[i]t's an adequate foundation." Tr. p. 311. In the support of this determination, Nurse Rentz testified that she has been a nurse for thirty-one years with twenty-six years spent working in the emergency department. Tr. p. 294. As a certified sexual assault nurse examiner, she received special training on the conduct of examinations of sexual assault victims. Tr. p. 293. Nurse Rentz completed this training in 1997 and passed a national exam in 2004. Tr. p. 294. She is also the program director of the Madison County Sexual Assault Treatment Center at Community Hospital. Tr. p. 295. Finally, Nurse Rentz has performed approximately 250 to 275 sexual assault examinations. Tr. p. 295. This testimony is sufficient to qualify Nurse Rentz as an expert.

Moore also argues that the testimony should have been deemed inadmissible because Nurse Rentz cited to a study but did not provide the author of the article or any other information about the study. We agree. While Nurse Rentz may have been qualified as an expert, this did not relieve her of an obligation to provide a citation to the study beyond a general statement that she had read it in a textbook. Tr. p. 312. An expert may use inadmissible hearsay evidence as background for her opinion; however, in this case, Nurse Rentz was allowed to testify about a study without providing any information that would establish its reliability. See Ind. Evidence Rule 702; Haycraft v. State, 760 N.E.2d 203, (Ind. Ct. App. 2001). In addition, the testimony as to the conclusions of the study was brief and confusing. The trial court abused its discretion when it allowed Nurse Rentz to testify about the study.

However, error in the admission of Nurse Rentz's testimony concerning the study was harmless. "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. An error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." Gall v. State, 811 N.E.2d 969, 976 (Ind. Ct. App. 2004) trans. denied.

The evidence presented at trial was more than sufficient to convict Moore. K.B. testified at trial and identified Moore as her attacker. Moore forced his way into K.B.'s home while armed, held a gun to K.B.'s head, forced her to engage in sexual acts with him, and took her cell phone to allow him time to get away. Therefore, we conclude that the admission of Nurse Rentz's opinion testimony was harmless.

Conclusion

The trial court did not abuse its discretion when it replaced a juror with an alternate. Also, the trial court's admission of Nurse Rentz's testimony regarding a study on injuries during consensual sex was harmless error.

Affirmed.

MAY, J., and VAIDIK, J., concur.